IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-5950

AMOS G. SPENCER,

Petitioner,

V.

THOMAS ISRAEL, WARDEN, FOR
THE STATE OF WISCONSIN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMOS G. SPENCER

Petitioner

Amos G. Spencer, #119176
Box 55
Stillwater, Minnesota 55082

QUESTION PRESENTED FOR REVIEW

Has petitioner been denied equal protection under the law, where judges at both state and federal levels have ruled the jury instructions in question unconstitutional, thereby reversing those cases for retrial, while petitioner had the identical instructions read at his trial, and has repeatedly had his conviction affirmed and been denied a new trial?

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The petitioner, Amos G. Spencer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Judicial Circuit entered on November 12, 1982.

OPINIONS BELOW

The Court of Appeals entered its Order affirming the denial of petitioner's motion for Writ of Habeas Corpus dated November 12, 1982, Spencer v. Israel, No. 82-1478. The United States District Court for the Eastern District of Wisconsin also denied this petitioner's motion for writ of habeas corpus, Spencer v. Israel, No. 81-C-759 February 9, 1982. Both opinions are attached in the appendix.

JURISDICTION

This Court is asked to review the judgment of the United States Court of Appeals for the Seventh Judicial Circuit entered November 12, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> Nor shall any person... be deprived of life, liberty, or property, without due process of law...

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 4, 1976, petitioner Amos G. Spencer was tried by a jury in the Circuit Court Branch I for Kenosha County, Wisconsin, on a charge of first-degree murder, contrary to Wis. Stat. § 940.01. His defense consisted of a claim of self-defense.

Following closing arguments and instructions, the jury retired, only to return about an hour and a half later for reinstruction on the crimes of first-degree murder and the lesser included offense of manslaughter. An instruction on retreat was also requested and given. Defense counsel asked the court at that time to reread the entire self-defense instruction. The court asked the jury if it wanted the instruction reread and, when no one responded, decided it was unnecessary to do so.

The jury again retired, but returned about fifty minutes later with a verdict of guilty of first degree murder. When the jury returned with the verdict, defense counsel was not present. After noting his absence, trial court accepted the verdict and polled the jurors individually. Rather than entering judgment on the verdict at that time, the court continued petitioner's bond and ordered him to appear with his attorney the next morning.

The following morning judgment was entered, and petitioner was sentenced to life imprisonment in the Wisconsin State Prisons.

Petitioner's trial counsel testified, at a post-conviction hearing, that he was "emotionally upset" after the jury's reinstruction and told the District Attorney he would not return for the reading of the verdict.

The Wisconsin Supreme Court, the United States District Court, and the United States Court of Appeals all agreed that petitioner was constitutionally entitled to the assistance of counsel at the return of the verdict and polling of the jury because the return of the verdict and polling of the jury was the ultimate, critical stage of the trial. Nevertheless, all three courts ruled that petitioner was not entitled to a new trial because the trial judge polled the jury, thus rendering the error harmless as defined in Chapman v. California, 386 U.S. 18, 24 (1967). On December 12, 1980 Mark Lukoff filed a petition for writ of certiorari to this Court and the petition for the writ was denied 80-5916, March 30, 1981. After this petition was denied, Mr. Lukoff refused to represent petitioner further. Prior to the above after learning of this Courts most (at that time) recent decision on Sandstrom v. Montana, 442 U.S. 510 (1979), on July 2, 1979, petitioner requested that Attorney Lukoff file a motion that would raise the issue that is being presented now. Mr. Lukoff would not do so. Then on January 9, 1980, petitioner filed a Pro se motion to the state trial court for post-conviction relief (974.06) (Wis. Stats.),

based on Sandstrom v. Montana, 442 U.S. 510 (1979). Petitioner's motion did not receive any response and was deemed denied, (Wis. 173 laws).

On June 28, 1981, petitioner filed to the United States District Court for the Eastern District of Wisconsin for a Writ of Habeas Corpus Pro se, and was granted leave to proceed in forma pauperis. For the petitioner to have continued any further in the state courts would have been futile because of the State Supreme Court having previously upheld the issue being appealed here in Muller v. State, 94 Wis. 2d 450 (1979). On February 9, 1982, Judge Robert W. Warren denied petitioner's request for a Writ of habeas corpus, based on the Seventh Circuits ruling in that the jury instruction used in Pigee v. Israel, Nos. 81-1269 & 81-1508 (7th Cir., Feb. 3, 1982), as not being unconstitutional. On February 18, 1982, petitioner made a motion to the Chief Judge, John Reynolds, to review the decision of Robert W. Warren. This motion was denied by Judge Robert W. Warren, 81-C-759.

On March 2, 1982, petitioner filed a petition for a writ of habeas corpus to the Seventh Judicial Circuit alleging three constitutional errors: (1) that the jury instruction on intent given at trial unconstitutionally shifted the burden of proof to the defendant; (2) that petitioner was denied effective assistance of counsel on appeal because of counsel's failure to raise the jury instruction issue; (3) that petitioner was deprived of assistance of counsel at trial when his counsel was not present when the jury came back with it's verdict. The Seventh Circuit refused to issue petitioner a certificate of probable cause, No. 82-1478, based mainly on Pigee v. Israel, 670 F. 2d 690 (7th Cir. 1982), cert. denied, 51 U.S.L.W. 3255 (U.S. October 4, 1982) (No. 81-6802), and Muller v. State, 94 Wis. 2d 450 (1979), by Order dated Nov. 12, 1982. This petition was also filed in forma pauperis and Pro se, even though petitioner had requested that the Court appoint counsel for him.

REASON FOR GRANTING THE WRIT

The State of Wisconsin has failed to compley with the U.S. Supreme Court Ruling in Sandstrom v. Montana; the United States District Court for the Eastern District of Wisconsin has also failed to abide by the "Sandstrom" ruling; the United States Court of Appeals for the Seventh Circuit is not in accord with the Supreme Court either.

The main issue in this petition is that the Honorable Earl D. Morton read to the jury first degree murder instructions that are virtually the same as those condemned and struck down by this Court. The instruction reads as follows:

> "When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all of the natural, probable and usual consequences of his deliberate acts. If one person assaults another violently with a dangerous weapon likely to kill, and the person thus assaulted dies therefrom, then when there are no circumstances to prevent or rebut the presumption, the legal and natural presumption is that death was intended". (Tr. 529 and 558).

These tainted instructions were not only read to the jury once, but "twice". The sole issue of petitioner's trial was "intent". Had the instructions not relieved the prosecution of the burden of proof in this element of the crime and imposed the mandatory presumption, petitioner submits a verdict other than first degree murder would have resulted.

The contested instructions have been actively ruled on by various courts in both the State and Federal levels. Petitioner is relying primarily on the United States Supreme Court decision of Sandstrom v. Montana, 442 U.S. 510 (1979), Austin v. Israel, 80-C-1061 (1981), Harris v. Israel, 76-C-736 (1981), Dreske v. Wisconsin Department of Social Services, 483 F. Supp. 783 (E.D. 1979 Wis.), State v. Arroyo, Conn. 1980, 429 A. 2d 457, State v. Caldwell Wash. 1980, 618 P. 2d 508, State v. Savage, Wash. 1980, 618 P. 2d 82, State v. Kyle, Montana 1981, 628 P. 2d 263, Tyler v. Phelps, C.A. La. 1981, 643 F. 2d 1095, Adams v. State, 92 Wis. 2nd 875 Ct. App. 1979).

Petitioner's right to a fair trial has been violated in like manner. But, he has been consistantly denied a new trial to correct the errors that have been perpetrated against him. In State v. Savage, (per Utter, C.J., with three Justices concurring and two Justices concurring in result), stated, "Whenever presumption is employed in criminal case, jury instructions must fully and adequately explain nature and operation of presumption to jury"... In petitioner's case this was never done, and his conviction has been upheld, while other petitioners have had their cases reversed and remanded for new trials because the jury was read the identical instructions that petitioner is contesting in this petition.

Due to the fact that "none" of the Judges either for the State of Wisconsin, or the Federal District Judges for the Eastern District of Wisconsin, and the Judges for the Seventh Judicial Circuit can agree as to the effect of the challenged instructions in a criminal trial, this Court should review the case and settle the conflict once and for all, directing the lower courts specific "PRONGS" clarifying the ramifications of the presumptive jury instructions.

CONCLUSION

For the foregoing reasons, petitioner Amos G. Spencer respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit in the interests of justice and equality.

Respectfully submitted,

DATED: 20th Day of Dec. 1982

Amos G. Spencer
Petitioner, Pro se
Box 55
Stillwater, Minnesota
55082

FEB 9 1982

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

AMOS G. SPENCER,

Petitioner,

vs. Case No. 81-C-759

THOMAS R. ISRAEL and the ATTORNEY GENERAL OF THE STATE OF WISCONSIN, BRONSON LA FOLLETTE,

Respondents.

ORDER

Petitioner alleges his constitutional right to due process was violated when the trial court gave the jury an unlawful instruction regarding intent. The Seventh Circuit recently examined the jury instruction about which petitioner complains and concluded that the instruction is not unlawful. See Pigee v. Israel, Nos. 81-1269 and 81-1508 (7th Cir., Feb. 3, 1982).

Petitioner also alleges he was denied the effective assistance of counsel at his trial because his attorney left the courtroom and was not present when the jury returned its verdict. This Court has previously denied petitioner's request for a writ of habeas corpus based on the identical ground. See Spencer v. Israel, No. 78-C-755 (E.D. Wis., Jan. 22, 1979).

For the foregoing reasons, the Court hereby denies petitioner's request for a writ of habeas corpus.

SO ORDERED this 9th day of February, 1982, at Milwaukee, Wisconsin.

Robert W. Warren
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 12, 1982

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. _____

AMOS G. SPENCER,
Petitioner-Appellant,

No. 82-1478 vs.

THOMAS ISRAEL,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 81 C 759

Robert W. Warren, Judge.

O R D E R

Petitioner filed a petition for a writ of habeas corpus, 28 U.S.C. § 2254, alleging three constitutional errors: (1) that the jury instruction on intent given by the trial court (Wisconsin Jury Instruction - Criminal 1100) unconstitutionally shifted the burden of proof to the defendant; (2) that petitioner was denied effective assistance of counsel on appeal for counsel's failure to raise the jury instruction issue; and (3) that petitioner was deprived of effective assistance of counsel at trial when trial counsel was not present when the jury pronounced the verdict.

The district court denied the petition because (1) the Seventh Circuit upheld the constitutionality of the jury instruction in question in Pigee v. Israel, 670 F.2d 690 (7th Cir. 1982), cert. denied, 51 U.S.L.W. 3255 (U.S. October 4, 1982) (No. 81-6802); (2) the petitioner was not denied effective assistance of appeal counsel due to counsel's failure to raise the jury instruction issue on appeal because the Wisconsin Supreme Court had already declared the instruction constitutional in Muller v. State, 94 Wis.2d 450 (1979); and (3) the petitioner had previously raised the identical issue of trial counsel's absence when the jury returned its verdict in another habeas petition before the same court and that petition

had been denied (see Spencer v. Israel, No. 78-C-755 (E.D.Wisc., January 22, 1979) affirmed in unpublished order dated November 13, 1980 in the Seventh Circuit Court of Appeals).

Petitioner has filed for issuance of a certificate of probable cause. We find there is no substantive question for review. Accordingly, we deny the request for issuance of a certificate of probable cause.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied for three reasons: First, the instruction given by the trial court in this case satisfies the constitutional test for the reasons set forth in Pigee v. Israel, 670 F.2d 690 (7th Cir.), cert. denied, 103 S. Ct. 103 (1982). Second, the petitioner has not been denied equal protection. And third, any decisions from this court would have little to no effect on future trials in the various states, including Wisconsin.

ARGUMENT

The petitioner has asked this Court to issue a writ of certiorari to consider his claim that he has been denied equal protection of the law because some courts have ruled that the jury instruction given in his case is unconstitutional and other courts have ruled that it is constitutional.

The instruction cited by the petitioner on page 5 of the petition for writ certiorari is basically the same instruction considered by the United States Court of Appeals, Seventh

Circuit, in Pigee v. Israel. See 670 F.2d at 697, n.1, dissenting opinion of Judge Baker. The only difference is that in the petitioner's case the instruction included the language "and the person thus assaulted dies therefrom," and that language was not included in the instruction in Pigee. This was due to the fact that the petitioner was charged with murder and Pigee was charged with attempted murder. In Pigee, the United States Court of Appeals for the Seventh Circuit concluded that the jury instruction did not infringe upon Pigee's constitutional rights. The respondent in the instant case submits that for the reasons set forth in Pigee, the instruction given in the petitioner's trial did not infringe upon his constitutional rights.

The petitioner argues that he has been denied equal protection of the laws because some courts have concluded that instructions like that given in his case were constitutional and other courts have concluded that they were unconstitutional. The respondent submits that the petitioner has not been denied equal protection. The decision in Pigee resolved the conflict in decisions among courts that considered instructions similar to that given in the instant case. The cases cited by the petitioner that considered Wisconsin jury instructions -- Austin v. Israel, 516 F. Supp. 461 (E.D. Wis. 1981); Harris v. Israel, 515 F. Supp. 568 (E.D. Wis. 1981); Dreske v. Department of Health and Social Services, 483 F. Supp. 783 (E.D. Wis. 1980), and Adams v. State, 92 Wis. 2d 875, 289 N.W.2d 318 (Ct. App. 1979) -- were decided before Pigee. See 670 F.2d at 696 n.15. The decision in Pigee resolved the conflict between those cases and the other cases cited in Pigee at 670 F.2d at 696 n.15.

The petitioner cannot claim that he was denied equal protection because the instruction in his case was found to be

constitutional and the instructions in other cases he cites were found to be unconstitutional. The petitioner cited Sandstrom v. Montana, 442 U.S. 510 (1979); State v. Arroyo, 180 Conn. 171, 429 A.2d 457 (1980); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981); State v. Kyle, 628 P.2d 263 (Mont. 1981); State v. Caldwell, 94 Wash. 2d 614, 618 P.2d 508 (1980), and State v. Savage, 94 Wash. 2d 569, 618 P.2d 82 (1980). The instructions given in those cases were not worded the same as the instruction given in the petitioner's case. Therefore, the petitioner cannot claim that he was denied equal protection simply because the instructions in those cases were found to be unconstitutional and the instruction in his case was found to be constitutional.

Because the decision in Pigee resolved the question of the constitutionality of the instruction given in the petitioner's case and because the instructions given in the cases for other jurisdictions differ from the instruction given in the petitioner's case, the petitioner was not denied equal protection because of the conflict in decisions over the constitutionality of the instruction given in his case. In fact, in light of Pigee, there is no conflict in the decisions over the constitutionality of that instruction.

Finally, because of the singular wording of the instruction at issue, and its replacement with different language in the Wisconsin standard jury instructions, a decision in this case would be of such limited effect that certiorari is not warranted. Research has uncovered no other jurisdiction utilizing an instruction qualified in the same way as the one given in the instant case. Consequently, a decision in this case will have no effect outside of Wisconsin. In addition, as the Seventh Circuit noted in Pigee, 670 F.2d at 696 n.16, Wisconsin no longer utilizes the

challenged language. Consequently, a decision in this case will have no effect on future cases even within Wisconsin.

CONCLUSION

For the reasons discussed above, the respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

BRONSON C. LA FOLLETTE
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March 10, 1983

NO. 82-5950

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AMOS G. SPENCER,

Petitioner,

v.

THOMAS ISRAEL, WARDEN,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

DENISE SCHILLING, being first duly sworn, on oath deposes and says that on the 10th day of March, 1983, she served the Respondent's Brief in Opposition to the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit upon Amos G. Spencer, petitioner, appearing pro se, by depositing one copy of the same in a United States mail box, with first class postage prepaid, to him at the following address: Box 55, Stillwater, Minnesota 55082.

Denise Schilling
Denise Schilling

Subscribed and sworn to before me
this 10th day of March, 1983.

Judith M. Waddell
Notary Public, State of Wisconsin
My commission: Expires 2/8/87